or Residency in which is situated the Registry out of which the writ of summons was issued, 20 days after service of the writ (including the day of service);"

In my view the words in brackets, "including the day of service", in Rule 4(a) above refer to both the eight days and the ten days mentioned in the Rule. Order 6 Rule 1 provides that every writ must be in Form 2 or 3 whichever is appropriate. It will be noted that Form 2 states:

"We command you that within eight days after the service of this writ on you, *inclusive of the day of such service*, you do cause an appearance to be entered ..." [Emphasis added].

Form 2 which is provided in Appendix A of the Rules of the High Court is part of the Rules and has the same force and validity as the Rules themselves: *Mallal's Supreme Court Practice*, 2nd. Edn. v.1 page 7.

It is clear that the eight days include the day of service. The judgment in default was, therefore, entered upon the expiry of fourteen days.

For the reasons stated above, the judgment entered in default of defence was a regular judgment.

Order accordingly.

Solicitors: *Khaw & Hussein; Albar, Zulkifly & Yap.*

LIM KIT SIANG v. UNITED ENGINEERS (M) BHD. & 3 ORS.

[O.C.J. (Edgar Joseph Jr. J.) August 18, 1987]

[Penang – Civil Suit No. 21-55-87]

Civil Procedure – Interlocutory prohibitory injunction – Application for – Merits of application – Application against Government – Application against public interest – Injunction causing maximum disruption – Government Proceedings Ordinance, 1956, s.29.

A suit was brought by Lim Kit Siang, a member of Parliament and leader of the Opposition in the Dewan Rakyat, against United Engineers (M) Bhd., the first defendant, the Finance Minister, the second defendant, the Minister of Works, Malaysia, the third defendant and the Government of Malaysia the fourth defendant. In his statement of claim, the plaintiff alleged, *inter alia*, that a contract for the construction and maintenance of certain roads in Malaysia was illegally and unfairly awarded to the first defendant through the hands of the second, third and fourth defendants.

The present application was brought by the plaintiff seeking an interlocutory prohibitory injunction restraining United Engineers (M) Bhd., by itself or through its agents and/or servants, from signing the proposed contract.

Held: (1) the court was satisfied that if the application was granted, it would operate in substance and effect as an injunction against the Government of Malaysia, the fourth defendant. Section 29 of the Government Proceedings Ordinance 1956 also posed an insuperable obstacle in the way of the plaintiff;

(2) the grant of the injunction would also impugn the powers of the Government of Malaysia to enter into contracts. Therefore, it would be against public interest to grant the injunction;

(3) there was also no evidence that the contract was illegal;

(4) the effect of granting the application at this late stage when preparations must have reached a very advanced stage must surely be to cause maximum disruption;

(5) in all these circumstances the application was dismissed.

[*Editorial Note:* The plaintiff appealed to the Supreme Court. In an oral judgment, the Supreme Court allowed the appeal. The transcript of the oral judgment is quoted *in extenso* by V.C. George J. in *Lim Kit Siang* v. *United Engineers (M) Bhd. & Ors. (No. 2)* (see post p. 50 at p. 53).

Cases referred to:

(1) *Pickwick International Inc (GB) Ltd.* v. *Multiple Sound Distributors Ltd.* [1972] 1 W.L.R. 1213.
(2) *American Cyanamid* v. *Ethicon* [1975] 1 All E.R. 504.
(3) *Smith* v. *Ilea* [1978] 1 All E.R. 411.
(4) *Morning Star Co-operative Ltd.* v. *Express Newspapers Ltd.* [1979] F.S.R. 113.

CIVIL SUIT.

Karpal Singh (*N. Shanmugam* with him) for the plaintiff.

Dato' Mohd. Saari bin Yusoff (State Legal Adviser) for the second, third and fourth defendants.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: Earlier this evening, I dismissed this application for an interlocutory prohibitory injunction restraining United Engineers (M) Berhad ("U.E."), the first defendant herein, by itself or through its agents and/or servants, from signing the proposed contract pursuant to the Letter of Intent for the privatisation of the North-South Interurban Toll Expressway. I shall now proceed to give my reasons for that decision.

The application was the result of a suit, being Civil Suit No. 21-55-1987, wherein the plaintiff is Mr. Lim Kit Siang, a Member of Parliament and Leader of the Opposition, and the defendants are U.E. (the first defendant), the Finance Minister (the second defendant), the Minister of Works (the third defendant) and the Government of Malaysia (the fourth defendant).

The plaintiff, by his statement of claim, seeks the following reliefs:

(1) A declaration that the award of Letter of Intent for the privatisation of the North-South Highway by the second and third defendants is null and void and of no consequence;

(2) An injunction to restrain the first defendant by itself or through its agents and/or servants or howsoever from signing the contract with any agent and/or servant of the Government of Malaysia;

(3) Costs and

(4) Any further or other relief deemed fit and proper by this honourable court.

The essential facts according to the affidavit of the plaintiff filed in support of the application may be stated in a few sentences.

On August 13, 1985, the first defendant had submitted a proposal to the Cabinet through the Ministry of Finance for the privatisation of the North-South Interurban Toll Expressway, the New Klang Valley Expressway and the upgrading of the Federal Highway Route 11 between Subang Jaya and Klang.

At a meeting held on January 29, 1986, the Cabinet decided that the Ministry of Works invites open tenders from concessionaries and entrepreneurs for the privatisation of the North-South Highway according to various "package" deals and proceeds with the project according to procedure after consultations with the Ministry of Finance.

By the closing date for tenders, the Ministry of Works received tenders from five contractors, all incorporated companies, of whom one was U.E., the first defendant.

In December 1986, U.E. emerged the successful tenderer for the $3.4 billion contract and was awarded a Letter of Intent by the Ministry of Works.

The plaintiff alleges that U.E. is an insolvent company which had reported losses of over $100 million and is still suspended from the Kuala Lumpur Stock Exchange. The plaintiff further alleges that an incorporated company, known as Hatibudi Sdn. Bhd., the investment arm of U.M.N.O., controls about 50% of U.E. The plaintiff also alleges that the Prime Minister, the Deputy Prime Minister, the Finance Minister (the second defendant) and the Minister for Agriculture (who were also trustees of Hatibudi), by taking part in the Cabinet decision on January 29, 1986 on the invitation of tenders for the North South Highway project, had used their public position for U.M.N.O.'s advantage in contravention of section 2 of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

The plaintiff also alleges wrongdoing on the part of the Finance Minister (the second defendant) and the Minister of Works (the third defendant).

So far as the second defendant is concerned, the plaintiff alleges that it was wrong in law for the second defendant, being a trustee of Hatibudi Sdn. Bhd. (a company with a substantial interest in U.E.), to have approved the award to U.E. So far as the third defendant is concerned, the plaintiff alleges that the third defendant was biased in favour of U.E. in that he and the M.I.C. (of which he is President) had benefited by the sale of about $1 million worth of Maju Institute of Education Development (MIED) lottery tickets to U.E.

Furthermore, the plaintiff alleges that the tender exercise for the privatisation contract and the evaluation exercise were not carried out fairly in that the terms offered by two of the other four contractors who competed for the contract were more favourable than those offered by U.E.

In conclusion, the plaintiff alleges that were the signing of the contract to proceed, the Government would be embarking upon an illegal transaction and his interest as a citizen, motorist and taxpayer and the interest of the public generally would suffer.

I must now turn to the application before me.

As the third defendant was reported in the *Star Newspaper* dated August 15, 1987 to have publicly announced that the contract would be signed some time this week, the plaintiff stressed the urgency of the application and his solicitors put in a Certificate of Urgency dated today. I therefore decided

to hear it today itself. But in view of the importance of the issues raised, I thought it desirable that although the application was an *ex parte* one, the State Legal Adviser be notified of the hearing so that I could have the advantage of listening to any arguments he may wish to advance on behalf of the second, the third and the fourth defendants. In the circumstances, the application was, in effect, an opposed *ex parte* application: see *Pickwick International Inc (GB) Ltd.* v. *Multiple Sound Distributors Ltd.*[1]

At the conclusion of the arguments, I dismissed the application mentioning two main grounds for doing so. However, I did add that there may be further and other grounds for my decision.

In the first place, I was amply satisfied that although the injunction sought was in form against U.E., the third defendant, it would, if granted, operate in substance and effect as an injunction against the Government of Malaysia, the fourth defendant. The maxim of equity is that equity looks to the substance and the intent, rather than to the form and so it was to the substance of the injunction sought that I should look. That being the case, section 29 of the Government Proceedings Ordinance, 1956, posed, in my opinion, an insuperable obstacle in the way of the plaintiff for it provides:

"29.(1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Ordinance, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that –

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government."

In the second place, in *American Cyanamid* v. *Ethicon*[2] Lord Diplock ended his enunciation of principle by saying: "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases." Actions against public authorities have been treated as a special case and so in assessing where the balance of convenience lies, the public interest may rightly be taken into consideration: *Smith* v. *Ilea.*[3] Bearing this in mind, I considered that were I to grant the injunction sought its effect would be to impugn the powers of the Government of Malaysia to enter into contracts. It seemed to me, therefore, that it would be plainly against the public interest to grant the injunction.

I might as well add that I did not consider that there was evidence to show that the proposed contract was illegal having regard to the provisions of section 24 of the Contracts (Malay States) (Revised 1974) Act which reads:–

"24. The consideration or object of an agreement is lawful, unless –

(a) it is forbidden by law; or

(b) it is of such a nature that, if permitted, it would defeat the provisions of any law; or

(c) it is fraudulent; or

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

There was also the further consideration that the writ and the application were filed with hardly any time left before the signing of the contract although this could have been done at a much earlier stage since the plaintiff had himself said that it was on January 1, 1987 that the Minister of Works (the third defendant) had publicly announced that U.E. had won the contract and that construction would start in April 1987. The effect of the grant of the injunction at this late stage when preparations must have reached a very advanced stage must surely be to cause maximum disruption.

Finally, the sufficiency of the personal undertaking as to damages offered by the plaintiff was open to serious doubt because, although the proposed contract had not yet been signed, some preparations must have been made since its execution

was imminent. It is trite law that if the plaintiff is not in a financial position to honour his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction must be refused: *Morning Star Co-Operative Ltd.* v. *Express Newspapers Ltd.*[4] However, having regard to the absence of any evidence as to the expenditure incurred in such preparations, I did not think it right or fair to place any reliance on this particular ground and I accordingly disregarded it.

In all the circumstances, the application was dismissed. However, I made no order as to costs as the application was made *ex parte*.

Application dismissed.

Solicitors: *Karpal Singh & Co.*

G.S. DAVID v. GOVERNMENT OF MALAYSIA & ORS.

[O.C.J. (Abu Mansor J.) June 15, 1987]

[Kota Kinabalu – Originating Summons No. 64 of 1986]

Administrative Law – Transfer of Senior Superintendent of Prison to Tawau by Director-General of Prisons – Whether transfer invalid – Prison Ordinance 1956 (Laws of Sabah), ss. 7 & 9 – Prison Ordinance, Federation of Malaysia (No. 81 of 1952) – Federal Constitution, Arts. 144(5A) & 160.

The plaintiff was a Senior Superintendent of Prison, Sabah Prison, Kota Kinabalu. On April 28, 1986, he received a letter from the Commissioner of Prisons, Sabah informing him that he had received a directive from the Director-General of Prisons that he was to be transferred to Tawau with effect from May 1, 1986. It is alleged that the Director-General of Prisons in directing the Commissioner of Prisons, Sabah to transfer him to Tawau acted in excess of his powers and administrative authority.

Held, dismissing the plaintiff's application: (1) the plaintiff's position must remain as he had opted to join the federalised service on June 30, 1978. His position, however, was not that he had contracted out as submitted by the Senior Federal Counsel but his position was governed by an Act of Parliament (section 9(2) of the Constitution (Amendment) Act 1981);

(2) if the plaintiff by virtue of the said section 9 was deemed to be in the public service of the Federation, as he was, it was clear therefore that he was subject to Civil Service Circular No. 1 of 1978. By virtue of LN. 199 of 1965 the Sabah Prison Ordinance 1956 became Federal law with effect from Malaysia Day 1963. By the same token the department became a Federal department;

(3) when the plaintiff was offered his post on August 14, 1965, he was offered the post by the Sabah Branch of the Federal Public Services Commission;

(4) in view of the overwhelming evidence, both by his conduct and the law, he was a Federal Officer whose appointment had been made under Federation of Malaya Prison Ordinance 1952. His head of department under the Ordinance was the Director-General of Prisons;

(5) having regard to all the facts and the law before the court, the transfer order dated April 22, 1986 seeking to transfer the plaintiff to Tawau Prison issued by the second defendant was valid as being in accordance with the F.M. Prison Ordinance 1952.

Cases referred to:

(1) *Minister of Home Affairs* v. *Datuk James Wong Kim Min* [1976] 2 M.L.J. 245.
(2) *Ooi Boon Leong & Ors.* v. *Citibank N A* [1984] 1 M.L.J. 222.
(3) *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo* [1982] 2 M.L.J. 31.
(4) *M.K. Retnam Holdings Sdn. Bhd.* v. *Bhagat Singh* [1985] 2 M.L.J. 212.
(5) *Assa Singh* v. *Menteri Besar, Johor* [1969] 2 M.L.J. 30.

ORIGINATING SUMMONS.

C.A. Skinner for the plaintiff.

Ms. Daphne Sebastian (Senior Federal Counsel) for the defendants.

Cur. Adv. Vult.

Abu Mansor J.: By plaintiff's originating summons dated May 19, 1986 the plaintiff prays for the following reliefs:

"1. A declaration that all officers serving in the Sabah Prison Service are subject to the Prisons Ordinance 1956. Laws of Sabah, and regulations made thereunder and that all administrative decisions relating to such officers may only be made by such persons as are empowered by the Prisons Ordinance 1956, Laws of Sabah.

2. A declaration that the Director-General of Prisons, Federation of Malaya has no power and/or authority in respect of the direction and administration of the Prison Service of Sabah.

3. A declaration that the order or directive or instruction issued by the 2nd defendant on April 22, 1986, purporting to direct the Commissioner of Prisons Sabah to transfer the plaintiff from Prison Headquarters at Kota Kinabalu to Tawau with effect from May 1, 1986, is invalid in law, *ultra vires* and of no effect.

4. A declaration that the letter of the Commissioner of Prisons Sabah dated April 28, 1986, informing the plaintiff of his transfer to Tawau pursuant to the directive or instructions issued by the 2nd defendant is invalid and not binding on the plaintiff."